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IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1944

BOUNDARY COUNTY, IDAHO, a municipal corporation of the State of Idaho, by RAY SIMS, ROBERT H. HARTLING, and CHARLES SCHAUER, its County Commissioners,

Petitioners,

v.

MARTIN WOLDSON,

Respondent.

No. 812

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

W. J. NIXON,
Courthouse,
Bonners Ferry, Idaho

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BOUNDARY COUNTY, IDAHO, a municipal corporation of the State of Idaho, by RAY SIMS, ROBERT H. HARTLING, and CHARLES SCHAUER, its County Commissioners,

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v.

MARTIN WOLDSON,

Respondent.

No.------

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT, the petition of Boundary County, Idaho, respectfully shows to this Honorable Court:

STATEMENT OF MATTER INVOLVED

Boundary County is one of the counties of the State of Idaho. On the 15th day of August, 1938, in compliance with State statute the real property, title of which is here in question, was deeded to petitioner by its tax collector for delinquent taxes and drainage district assessments (R. 13). Martin Woldson, who is a citizen of the State of Washington, was the owner of the bonds of the drainage district.

On the 15th day of October, 1938, in compliance with State statute, the lands here involved were offered for sale at public auction for cash (R. 13), Woldson's was the only bid, the amount thereof being $72,143.96 (R. 95). His bid was rejected for the reason the amount thereof was insufficient (R. 96). Whereupon Woldson commenced an action in the State Court of Idaho for the purpose of compelling acceptance of his bid, which resulted in the entry of a final judgment and order for writ of mandate dated December 24, 1938, commanding the conveyance by petitioner of the property here involved to him upon payment of his bid either in cash *or its equivalent* (R. 52).

Woldson attempted to satisfy his bid by the payment to petitioner's treasurer of the sum of $22,811.33 in cash and $49,232.63 in bonds and interest coupons of the drainage district (R. 149). Thereafter and on the 30th day of December, 1938, the lands were deeded to him by the then commissioners of petitioner. On June 16, 1940, the commissioners of the drainage district demanded that your petitioner pay in cash and pro-rate into its various funds, its proportionate share of the $72,143.96 bid by Woldson (R. 15-17). Woldson was notified of this demand and requested to make good the remainder of his bid which had not theretofore been paid in cash but had illegally been attempted to be paid by bonds and interest coupons of the drainage district (R. 17-18). He refused to make good his bid, whereupon your petitioner commenced this action

against Woldson to compel payment in cash of his bid, or, in the alternative, that the deeds to the lands here in question be set aside (R. 2-7).

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(A) of the Judicial Code as amended by the act of February 13, 1925, 43 St. Stat. 938.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed August 8, 1944, and reported in 144F (2d) 17. Petition for re-hearing was filed on September 5, 1944, and denied on October 4, 1944 (R. 296).

QUESTIONS PRESENTED

The Honorable C. C. Cavanah, Judge of the United States District Court of Idaho, Northern Division, applying local law, decided that the sale to Woldson was void (R. 183) (appendix). He retired before making findings of fact, conclusions of law and entering judgment. The Honorable L. B. Schwellenbach was called in on assignment for the purpose of making findings of fact, conclusions of law and judgment in that case. He rendered an opinion reversing Judge Cavanah, *Boundary County v. Woldson,* 49 Fed. Supp. 600. The decision here sought to be reviewed sustains the decision of Judge Schwellenbach which gives rise to the following questions of law:

Is the decision here sought to be reviewed in conflict with State law controlling the subject matter of

the action as interpreted by the Supreme Court of the State of Idaho?

Can commissioners of a county which, by virtue of operation of State statutes, acquires land by reason of unpaid taxes and drainage assessments and thereafter, in conformity with State statutes, offer the land so acquired for sale at public auction for cash and receive a bid therefor, divest the county of title to a bidder who does not pay cash?

Is a judgment of a State Court which directs the acceptance of something other than cash in payment of a bid made at a tax sale held under statutes specifically requiring such payment to be made in cash, void on its face?

Is the judgment of a State Court not appealed from, directing the acceptance by county commissioners of something other than cash in payment of a bid made at public auction held under State statutes specifically requiring payment to be made in cash, immune to collateral attack in a subsequent action in the United States District Court between the same parties and involving the same subject matter?

Is a county whose commissioners have accepted something other than cash in payment of a bid made at public sale of lands in violation of State statutes specifically requiring payment thereof to be in cash, estopped by the conduct or acts of such commissioners and barred from repudiating the transaction?

REASON FOR GRANTING PETITION

The United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law in conflict with applicable decisions of the Supreme Court of the State of Idaho.

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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Spokane, Washington

CLAUDE D. RANDALL,
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Spokane, Washington,
Attorneys for Petitioner

IN THE

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BOUNDARY COUNTY, IDAHO, a municipal corporation of the State of Idaho, by RAY SIMS, ROBERT H. HARTLING and CHARLES SCHAUER, its County Commissioners,

Petitioners,

v.

MARTIN WOLDSON,

Respondent.

No.------

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

In this case there are three opinions: two conflicting opinions from two Judges of the United States District Court, Northern Division of Idaho, and an opinion from the United States Circuit Court of Appeals for the Ninth Circuit, found: Page 20, appendix this brief; *Boundary County v. Woldson*, 49 Fed. Supp. 600, 144 Fed. (2d) 17, respectively.

STATEMENT OF GROUND ON WHICH JURISDICTION IS INVOKED

The Circuit Court of Appeals for the Ninth Circuit has decided an important question of local law

in conflict with applicable decisions of the State of Idaho. *Kivett v. Owyhee County,* (Ida.), 74 P. (2d) 87.

Jurisdiction is invoked under Section 240(A) of the Judicial Code as amended by the act of February 13, 1925, 43 St. Stat. 938.

STATEMENT OF CASE

Petitioner is a County of the State of Idaho. By reason of delinquent taxes and drainage district assessments it became the owner of the lands involved in this litigation. The lands, in conformity with State statute, were advertised and offered for sale at public auction (R. 13). Woldson, a citizen of Washington, bid $72,143.96 (R. 8-10).

The commissioners of Boundary County, in reliance on Idaho Statute, Sec. 30-708, I.C.A. (appendix), rejected Woldson's bid for the reason that it was insufficient to cover all delinquent taxes and assessments for which the land was being sold (R. 95). Woldson, in the Idaho State Court, sought and received judgment and peremptory writ directing acceptance of his bid upon his paying "cash or its equivalent," provided that State and County taxes were paid in cash (R. 52).

Woldson owned all the bonds and interest coupons of the drainage district covering the lands embraced herein (R. 16). The drainage district made demand on petitioner to, in conformity with Idaho Statute, pay into its various funds its pro rata share of Woldson's

bid (R. 15-17). Petitioner in turn demanded of Woldson payment of the remainder of his bid in cash (R. 17) which demand was by him refused. This action (R. 2-7) was commenced in the State Court and removed to the United States District Court, Northern Division of Idaho, on petition of Woldson. The purpose of the action is to recover the unpaid portion of the bid, or in the alternative, for recovery of title to the lands.

ARGUMENT BRIEFLY SUMMARIZED

Your petitioner, in its capacity as a County of the State of Idaho, became the owner of the lands here in controversy under Idaho statutes, by virtue of delinquent taxes and assessments. It thereafter sought to sell the lands, title to which is here in question, for cash at public auction in compliance with State statutes. Woldson was a bidder at the sale (R. 13).

It is the contention of petitioner that it, under local law, had the right to reject Woldson's bid for the reason that it was, in the judgment of its County Commissioners, insufficient, Sec. 30-708, I.C.A.; that the judgment of the Idaho Court ordering petitioner's commissioners to accept Woldson's bid was *void* for want of jurisdiction; that the judgment of the Idaho State Court ordering the acceptance of Woldson's bid for cash *or its equivalent* was void because made in violation of statute, therefore being in excess of jurisdiction; that sale and transfer of deeds to lands in question was void in any event because of failure of Woldson to comply with terms of bid and sale; that the bonds and interest coupons were not the equivalent of cash and could not be used as cash in the performance of the terms of his bid; and that Woldson has not made good his bid or paid a valid consideration for the lands deeded to him in conformity with his bid.

ARGUMENT

UNDER LOCAL LAW PETITIONER ACQUIRED THE LANDS HERE IN QUESTION FREED OF ALL LIENS AND ENCUMBRANCES, INCLUDING THOSE OF WOLDSON'S BONDS.

Sec. 61-1032, *I. C. A.* (appendix);

Hunt v. City of St. Maries, et al, 260 Pac. 155;

Heffner v. Ketchen, 296 Pac. 768;

Smith v. City of Nampa, 68 P. (2d) 344;

Thompson v. Goble, 71 P. (2d) 100.

LOCAL LAW PRESCRIBED METHOD OF SALE AND PAYMENT TO BE RECEIVED FOR COUNTY PROPERTY.

Sec. 30-708, *I. C. A.* (appendix).

Failure to receive cash in payment of a bid made at public sale advertised to be for cash renders the sale *void. Kivett v. Owyhee County,* (Ida.), 74 P. (2d) 87.

THE COLLECTION AND PAYMENT OF TAXES IS CONTROLLED BY LOCAL LAW.

Richmond v. Bird, 249 U. S. 174, 63 L. Ed. 543;

New Jersey v. Anderson, 203 U. S. 483, 51 L. Ed. 284;

In re Davenport Dry Goods Co., 9 Fed. (2d) 477.

TITLE TO REAL PROPERTY IS GOVERNED BY STATE LAW.

Paepcke v. Kirkman, 55 Fed. (2d) 814;

Brown v. Leo, 12 Fed. (2d) 350;

Fletcher v. Delaware L. & W. R. Co., 79 Fed. (2d) 306.

That portion of the judgment of the State Court directing the acceptance by commissioners of payment of Woldson's bid in something other than cash, in violation of State statute Sec. 30-708, I. C. A. (appendix) was *void. Ex Parte Cox,* (Ida.), 32 Pac. 197; *Glover v. Brown,* (Ida.), 184 Pac. 649.

WAS WOLDSON THE HIGHEST BIDDER FOR CASH?

The term "highest bidder means him who will make the highest bid for all the property." *Fox v. Wright,* 152 Cal. 59, 91 Pac. 1005; *Merchants Trust Co. v. Wright,* 161 Cal. 149, 118 Pac. 517.

"A sale for cash is a sale for the money in hand."

Dazet v. Landry, 21 Nev. 291, 30 Pac. 1064, 1066.

The foregoing citation is cited with approval by the Supreme Court of Arizona in the case of *Ray v. Frye,* 119 P. (2d) 941.

"The sale must be for cash unless credit is expressly authorized. If the credit is part of the agreement of sale, it is absolutely void * * *."

Blackwell on Tax Titles, Sec. 509.

A VOID JUDGMENT IS NO JUDGMENT AT ALL

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void * * *."

Freeman on Judgments, Section 116, page 176; cited with approval in *Glover v. Brown,* (Ida.), supra.

PERSONS DEALING WITH A COUNTY ARE OBLIGATED TO SEE TO IT THAT ITS CONTRACTS ARE LEGAL.

"It is incumbent upon persons or corporations making contracts with a county to see that they are legal contracts."

Jackson Equipment & Service Co., et al v. Dunlop, et al, 172 Miss. 752, 160 So. 734 at 737.

Western Paint & Chemical Co. v. Board of County Com'rs of Kingfisher County, 172 Okl. 599, 46 P. (2d) 543;

Shawnee News Co. v. Board of County Com'rs, 173 Okl. 106, 46 P. (2d) 568;

McDonald v. Scott County, 87 S. W. (2d) 1019;

Leslie County v. Keith, 227 Ky. 663, 13 S. W. (2d) 1012.

COUNTY NOT ESTOPPED TO REPUDIATE CONTRACT MADE BY ITS COMMISSIONERS IN EXCESS OF ITS POWER OR AUTHORITY TO MAKE, IT BEING VOID.

Litchfield v. Ballou, 114 U. S. 190, 29 L. Ed. 132, 5 Sup. Ct. Rep. 820;

Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48, 35 L. Ed. 55, 64, 11 Sup. Ct. Rep. 478, 484;

Daviess County v. Dickinson, 117 U. S. 657, 664, 29 L. Ed. 1026, 1029, 6 Sup. Ct. Rep. 897, 900;

Vial v. Paradis, (Ida.), 255 Pac. 643, 53 A. L. R. 191.

"If the contract was one beyond the power of a county under any circumstances to make, then the keeping and using of the machinery would not constitute an estoppel, and the act of the county under such circumstances could not be ratified. The rule is laid down by *Dillon on Municipal Corporations,* Section 797, as follows: 'A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers, but not otherwise.' (citing cases)."

Scott v. Advance Romelly Thrasher Co., 288 Fed. 739, 36 A. L. R. 938.

We believe it patent that your petitioner is gravely affected by the decision in this case contrary to the local laws under which it is governed in that the decision affects its fiscal structure and constitutes precedent for the payment of bids made at its tax sales in other than cash in contravention of local law.

We respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Section 61-1009, Idaho Code Annotated:

"Delinquency Tax Entries.—No taxes levied for any year and entered upon the real property assessment roll shall be received by the tax collector on or after the fourth Monday of December and prior to the fourth Monday of January or after the fourth Monday of June, and prior to the fourth Monday of July, in the succeeding year.

The tax collector must, on or before the first Monday of January in said succeeding year, carry over and enter all delinquent taxes and the penalty thereon, in the proper columns provided therefor in the real property assessment roll, which entry of delinquency shall be dated as of the first Monday of January of each year and shall have the force and effect of a sale to the tax collector as grantee in trust for the county, for all property entered upon the real property assessment roll on which one-half of the original amount of such taxes has not been paid.

The tax collector must, on or before the first Monday of July in said succeeding year make delinquency entries as hereinbefore described, to be dated as of the first Monday of January in the year such taxes fall delinquent, for all property entered upon the real property assessment roll on which the remaining one-half of the original amount of such taxes, with the penalty added thereto, has not been paid.

The auditor shall charge the tax collector with the total amount of all delinquency entries and credit him with all payments and redemption thereof."

Section 2. Section 61-1025 Idaho Code Annotated, as amended 1933 Session Laws, Chap. 2, is hereby amended to read as follows:

'61-1025 TAX DEED—ISSUANCE. If the property is not redeemed within three years from the date

of the delinquency entry, the tax collector or his successor in office must make to the county a deed to the property.'

Section 61-1025 as amended by the Session Laws of 1939:

Section 1. The term "delinquent taxes" as herein used shall be deemed and construed to include all general taxes and special assessments and charges entered in county tax rolls and collectible in the same manner as general property taxes, levied, assessed or charged against real property, including taxes on personal property secured by lien on real property.

Section 61-1032 Idaho Code Annotated:

"Effect of Tax Deed as Conveyance.—The deed conveys to the grantee the absolute title to the land described therein, free of all encumbrances except mortgages of record to the holders of which notice has not been sent as provided in Section 61-1027 and except any lien for taxes which may have attached subsequently to the assessment."

Section 30-708, as amended by Idaho Session Laws of 1939:

"Sale of County Property—Procedure—Property Acquired Through Tax Deed—Sales to United States. To sell or offer for sale at public auction at the courthouse door, after thirty days' previous notice given by publication in a newspaper of the county any property, real or personal, belonging to the county, not necessary for its use, except that such personal property not exceeding $50.00 in value may be sold at private sale without advertisement and such sale of real property may be made by the Board of County Commissioners, either for cash or upon such terms as the Board of County Commissioners may determine, and the same must be sold to the highest bidder. The

proceeds from such sales shall be paid into the County Treasury for the use of the county, unless such property has been acquired by tax deed, in which event the proceeds from such sale shall be prorated to the taxing districts in which the property is situated in proportion of each tax for the year of delinquency upon which the tax deed was issued to the county. If such property is sold on terms the Board of County Commissioners may contract for the sale of the same for a period of years not exceeding * ten years, with an annual rate of interest on all deferred payments not to exceed six per cent per annum. The title to all property sold on contract shall be retained in the name of the county until full payment has been made by the purchaser. Any property sold by the Board of County Commissioners under the provisions of this Section, either for cash or on contract, shall be assessed by the County Assessor in the same manner and upon the same basis of valuation as though the purchaser held the record title to the property so sold. The Board of County Commissioners shall have authority to cancel any contract of sale if the purchaser shall fail to comply with any of the terms of such contract, and retain all payments paid thereon. The Board of County Commissioners may by agreement with the purchaser modify or extend any of the terms of any contracts of sale, but the total period of years shall not exceed ten years. Any such sale made by the Board of County Commissioners of property acquired through tax deed shall, subject to the provisions of this Section, vest in the purchaser all of the right, title and interest of the county in the property so sold, including all delinquent taxes which have become a lien on the property since the date of the tax sale certificate upon which any tax deed has been issued, and such Board shall have *discretionary authority* to reject or accept any bid which may be made for a less amount than the total amount of all delinquent taxes, penalties, and interest which may have accrued against any property so offered for sale, including the amount specified in the tax deed to the county. It shall be the duty of the Board of

County Commissioners in advertising any property for sale, under this Act, which has been acquired by tax deed to insert either before or after each description of real estate offered for sale the name of the taxpayer as it appears in the delinquent tax certificate upon which the tax deed held by the county was issued. Whenever a sale or transfer of any real estate acquired by tax deed has been made under the provisions of this Section, the bidder for any such real estate, whether bidding for himself or for another must include or add to such bid the additional sum of one dollar, which sum shall be a fee for recording the deed conveying such real estate to the purchaser. No deed for any such real estate sold under the provisions of this Section shall be delivered to a purchaser or his representative until such deed has been recorded in the county making the sale.

"Provided, that any title to real property heretofore and/or hereafter acquired by any county under a tax deed, which in the judgment of the Board of County Commissioners is suitable for the production of trees and/or as a watershed, may be granted and conveyed by deed, to the United States of America by the county tax collector upon the order of the Board of County Commissioners. The said Board of County Commissioners shall appraise and determine the value of such real property immediately prior to the execution of the deed conveying the same to the United States of America. And the Board of County Commissioners shall accept from the United States of America for and on behalf of the county, as full compensation for each tract and parcel of such real property conveyed, title to stumpage having an approximate value equal to the appraised value of the real property described in the deed or conveyance. All stumpage acquired by the county under the provisions of this paragraph shall be sold by the Board of County Commissioners for a price which shall not be less than its approximate value at the time it was received by the county from the United States of America, and the proceeds of such sale of such stumpage shall be de-

posited in the County Treasury for the use of the county. The execution by the county tax collector of the deed of conveyance to the United States of America conveying any tract or parcel of such real property shall operate to discharge and cancel all levies and/or liens for taxes and special assessments made or created for the benefit of the State, county, school district or any taxing unit or district, and to cancel all titles or claims of title, including claims for redemption, to such real property, asserted or existing at the time of such execution. No public notice of the intention to convey title to any of the real property defined by this paragraph shall be necessary.

"Provided further that when any city or village desires to acquire lands, for the purpose of constructing and maintaining an aviation field, airport, hangars and other air navigation facilities thereon, as provided in Chapter 3, Title 21, Idaho Code Annotated, and the title to all or any portion of the lands so desired for such purpose not exceeding in area 1,280 acres, is vested in any county under tax deed, said land so owned by the county, may be sold and conveyed to any such city or village for such purposes by the county owning the same at a price to be fixed by resolution of the Board of County Commissioners. No public notice of the intention of the county to sell and convey title to any city or village for such purpose shall be necessary.

"Provided further that the Board of County Commissioners may, in their discretion, without previous notice by advertisement or otherwise, grant to the State of Idaho, with or without compensation, for state highway purposes, any real property heretofore or hereafter acquired by the County, by tax deed.

"The execution and delivery by the county of the deed conveying such property to the State, city or village for such purposes, which shall be specified in the deed, shall operate to discharge and cancel all levies, liens, taxes and special assessments made or created for the benefit of the State, county, school district and

all other taxing units and to cancel all titles or claims of title including claims of redemption to such real property asserted or existing at the time of such conveyance."

Approved February 25, 1939. (Italics ours.)

Opinion, Judge C. C. Cavanah, dated June 15, 1942 (omitting formal parts). Boundary County, a municipal corporation of the State by its Commissioners seeks judgment against the defendant to recover the sum of $49,232.63, and interest, or in lieu thereof, that certain tax deeds issued by the County be cancelled and held void and that the defendant be required to make an accounting of the earnings of the farming operations of the lands covered by the deeds, and that said amount be offset against the cash payments made by the defendant in connection with the issuance of the deeds, and judgment for any amount in which the earnings exceed the amount of the payments made by the defendant, and in case the defendant fails to reconvey the lands to the County, that a Commissioner be appointed with authority to execute and deliver to the County the necessary deeds reconveying the land.

The defendant answers and places in issue the principal questions urged by the parties and seeks judgment against the County and Ray Sims, one of the plaintiffs for the sum of $75,000.00 as alleged damages for alleged failure to perform their duty.

The case is one of numerous controversies between the defendant and the County, and the Drainage District, heretofore instituted in the State and Federal

Courts and presents a dispute which probably will bring to a final conclusion the controversies between the parties involving every situation in attempting to drain the District, as every conceivable question has been presented to the Courts for solution.

The principal issues as presented by the pleadings and the evidence relate to whether the County is the real party in interest and whether the tax sale of the lands to the defendant was valid and made in compliance with the laws of the State.

It appears that in December, 1938, the defendant in an action which he brought in the State District Court against the Commissioners of the County and the Drainage District, obtained a preemptory writ of mandate which required the County to execute and deliver to him, deeds to certain real property described, upon the defendant paying to the County, the consideration for the lands, in the amounts set forth in the writ. In compliance with the writ, the plaintiff executed and delivered to the defendant, sundry tax deeds covering the property in question. The manner of paying the full consideration by the defendant was the sum of $22,811.33 in cash and the balance of $49,232.63 in bonds, and bond interest coupons, of the Drainage District.

The lands having been deeded to the County for delinquent general taxes and delinquent Drainage District Assessments, the County attempted to sell them at public sale under Section 30-708 I. C. A., and the defendant, at the sale, bid various sums for the land

set forth in the writ of mandate, which was rejected by the County Commissioners for the reason that this bid did not cover all taxes and assessments against the land.

The total outstanding assessments against the District for drainage purposes was $179,878.90 which does not cover State, County and School taxes levied. The State District Court held that the law relating to the sale of land for assessments and taxes in effect at the time of the delinquencies and under which the land was sold was Section 3423 Idaho Compiled Statutes 1919, and further held in the case of Woldson v. Commissioners of the County and the Drainage District, that upon Woldson "making payment to the said defendants or to the Treasurer of Boundary County, Idaho, for said property the amount of said payment either in cash or its equivalent provided, however, that the amount due to Boundary County, Idaho, for State and County taxes shall be paid in cash."

As to the first proposition, as to whether the County is a real party in interest in the present suit there would seem to be no doubt after considering the issues raised by the pleadings and the evidence, for we find that in previous litigation between it and the officials and the defendant, and especially in the case where the County was the defendant, where the defendant here secured a writ of mandate directed to the officials of the County to execute the deeds in question, and where he claimed that the Commissioners of the County failed to comply with the requirements made

on them by the writ of mandate which provides: "We command you the * * * County Commissioners of Boundary County, Idaho, immediately upon receipt of this letter, laying aside all excuses whatsoever, that you convene in session and take the necessary procedure to, and that you do issue to Martin Woldson a deed conveying to him the property hereinbefore described for the amount set forth, upon him paying to you or to the County Treasurer of Boundary County, Idaho, the consideration for said land and each and every description thereof, in the amount set forth in this writ * * *."

It will be remembered that in the first instance the land was sold to the County, whose officers thereafter attempted to conduct a tax sale and sold it to the defendant, and did not receive cash in full to cover his bid, as part of the consideration of his bid was paid in cash and part in bonds and bond interest coupons.

After considering the above provisions of the writ of mandate which requires the defendant paying to the County or to the County Treasurer, the consideration for the land and each and every description thereof, in the amount set forth in the writ, it is clear to assume that the Court, when issuing the writ of mandate, required the payment by the defendant to be in the amount set forth in the writ, and not in payment in bonds or bond interest coupons, and therefore the County certainly is now interested in setting aside the attempted sale to the Defendant made by its officers where the defendant did not pay for the land in the

manner provided for by the Statute of the State and the decree of the State Trial Court providing that the payment may be made in "Cash or its equivalent," would seem to inject therein the expression "its equivalent" not in compliance with the requirement of the statute, which confines the payment exclusively "in cash" and therefore the expression "its equivalent" may be treated either as surplusage or void when we come to consider the express requirement of the statute, that the payments are to be made "in cash."

The County through its officials is the only party who can comply with the writ and therefore is interested in questioning the validity of the tax deeds issued by one of its officials, and so is it and the plaintiff Sims in defending against a demand for judgment against them in the sum of $75,000.00 as damages.

We approach then, the next question in the case as to whether the tax sale of the land was made in compliance with the State statute, and if not, then the tax deeds issued thereat should be set aside and held void.

As stated, the State District Court held that upon the defendant making payment to the Treasurer of the County either in cash or its equivalent, except the amount due the County for State and County taxes should be paid in cash, tax deeds shall be issued to the defendant upon his bid made at the sale.

The State statute relating to the sale at the time of

the delinquencies of State taxes and assessments and under which the land was sold, provides: "Section 3423. Sale of County Property. To sell at Public auction at the Courthouse door, after 30 days' previous notice given by publication in a newspaper of the County, or posted in five public places of the County, and convey to the highest bidder, for cash, any property, real or personal, belonging to the County, not necessary for its use, paying the proceeds into the County Treasury for the use of the County."

This statute specifically provides that the lands are to be conveyed to the highest bidder for *cash* and the effect of the tax deed is to convey to the grantee absolute title to the land free of all encumbrances except mortgages of record and any lien for taxes which may have attached subsequently to the assessment, Section 61-1032 I. C. A. *Hunt v. City of St. Maries, et al.*, 44 Idaho 700; *Heffner v. Ketchen, et al.*, 50 Idaho 435; *Smith v. City of Nampa, et al.*, 57 Idaho 736; *Thompson v. Goble, et al.*, 58 Idaho 126. It would seem that under the laws of Idaho it is incumbent on those who own special improvement bonds of the District to protect such bond lien for non-payment of tax liens prior to tax sales; *Hunt v. City of St. Maries, et al., supra; Heffner v. Ketchen, et al., supra.*

When the payment of the purchase price of the land is received by the County Treasurer in cash, as required by the State statute, he must then apportion the payment prorata to the various taxing districts, and the funds must be prorated to the various funds in

proportion to the amount levied for various purposes by the Drainage District. Section 30-708 I. C. A., and the County Treasurer cannot apportion bonds, bond interest coupons and warrants into the various funds. The State statute further provides that the bonds of the district and accrued interest coupons detached from the bonds of the district, when presented, may be accepted as cash in payment of *assessments* levied for bond interest and principal but does not permit the acceptance as cash for the purchase price of land sold at tax sale. The delinquent land owner may redeem his land from the *assessment* by paying the *assessment* in bonds, interest and principal, prior to the tax sale, but not paying the purchase price of the tax sale, which is purchasing the land. So it is apparent that the manner of paying the purchase price at the tax sale for cash "or equivalent" to cash is superfluous and void and the attempt to here pay a part of the purchase price of the land at the tax sale in bonds, interest and principal, runs counter to the statute as it is uncertain to say that they are equivalent in worth or value as cash. No evidence appears that the bonds and bond interest coupons are equivalent to cash. The mere fact that they are a lien on the land does not establish that they are equivalent to cash of the amount of the bid. It will be remembered that the levies were assessments for maintenance of the District and to pay outstanding warrants issued by the District and the bonds and interest coupons of the defendant are not a lien upon the assessments levied for those special purposes, and yet those levies were

part of the taxes and assessments for which the land was sold, and those funds of the District are entitled to their prorata share of the purchase price brought by the land at the sale.

Whatever rights or remedies inure to the defendant or the holder of the bonds and warrants of the drainage district is provided for by the statute of the State and the defendant as such holder of the bonds will have to proceed in realizing on them in the manner provided for by the statute.

Therefore, under the laws of the State and the evidence disclosing a non-compliance with the statutes of the State by both parties, the attempted tax sale and the deeds issued to the defendant should be set aside and held void, and the defendant is required to execute deeds disclaiming any interest in the lands to the County, within thirty days and failure to do so the Clerk of this Court shall, as Commissioner, execute and deliver such deeds to the County, and the attempted cancellation of the bonds delivered by the defendant to the County should be set aside and the bonds and bond interest coupons be returned to him uncancelled, as the parties are still in the same situation as they were in prior to the attempted sale, and that an accounting be had as to whatever amounts the defendant has paid out on said attempted sale and subsequent taxes, and earnings of the defendant, if any, in the farming operations of the lands, and after the accounting is had the Court will then determine the rights and liabilities of the parties.

It is further concluded that the demand of the defendant as damages upon his alleged cross complaint is not sustained in view of the conclusions here reached upon the issues thus stated and evidence and principles of law applicable.

Accordingly an order is entered directing the accounting be had within sixty days and that in the event the parties do not agree upon one to take the account within ten days the Court reporter of this Court is directed to take the same.

No. 812

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CLERK

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1944

BOUNDARY COUNTY, IDAHO, a municipal corporation of the State of Idaho, by RAY SIMS, ROBERT H. HARTING and CHARLES SCHAUER, its County Commissioners, *Petitioners*,

v.

MARTIN WOLDSON, *Respondent.*

No. AS 812

REPLY BRIEF OF RESPONDENT TO APPLICATION FOR WRIT OF CERTIORARI

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No. AS 812

REPLY BRIEF OF RESPONDENT TO APPLICATION FOR WRIT OF CERTIORARI

FOREWORD

In order that this Court may have a clear understanding of the legal questions arising in this case, we deem it proper to give a full statement of the facts involved in order to show entire lack of any question which would warrant this Court in taking jurisdiction of this case. Petitioners take up pages 15 to 20 in their Brief with the tax statutes of Idaho *now exist-*

ing. They leave out the statute which the Idaho Court on March 25, 1933, held controlled the sale complained of, pages 46 and 50, Transcript, by Judge Reed. This decision was approved and confirmed in the latter case by Judge Elder, pages 62 to 65.

STATEMENT OF THE FACTS

This case in the Federal Court is a culmination of lengthy litigation covering a long period of years, consisting of some four cases in the State Court, and three cases in the Federal Court, including this one. The whole litigation has been caused and brought about by the attempt of some of the land owners in Drainage District No. 1 to evade the payment of assessments which they themselves had caused to be made on their own land in the District for the purpose of reclaiming the same, as well as to evade the annual maintenance in keeping the water from the land each year in order that they could farm the land and secure large crops therefrom, and of which maintenance charges they had secured the full value. In this they were actively assisted by the various Boards of County Commissioners of Boundary County, Idaho, and other Boundary County officials who deliberately refused to perform their duties and take tax deeds to the land when the period provided by law had expired, but allowed the owners who refused to pay, which consisted of less than one-half of the land in the District, to remain on the land, allowing the annual assessments for upkeep and pumping the water from the land to accumulate and go delinquent, but at the

same time paying just enough State and County taxes to keep the deeds from becoming due for the same. In this action they were also actively assisted by part of the Commissioners of the District, and through this means they secured ten years' use of the land which had been swamp land and lake bottom of little value until reclaimed, and harvested large crops from it. The Plaintiff, Martin Woldson, owned all the bonds of the District and a large majority of the warrants. He had advanced the money to get the material to dyke the land and had built the dykes. When the time elapsed for the payment of the assessments Martin Woldson demanded that the County authorities proceed to take the deeds as required by law. They refused to do so and after much delay he brought a mandamus action to compel it, pages 60 to 65. The assessments allowed to accrue for the ten years, with interest, amounted to from $80.00 to $90.00 on some land and from $70.00 to $100.00 per acre on other land. pages 70 and 80. In addition to this there was a large amount of other taxes which had accrued so that with the outstanding assessment for bonds still held by Martin Woldson, not levied for, an additional sum of about $30.00 per acre was also a charge against the land, pages 70 to 76. The Court found that the *use value* of the property was sufficient to have paid all these assessments, paragraph XVI., pages 79 and 80, that the drainage system was not being kept up and the land owners were destroying the property, the District's credit, and that the District Commissioners were assisting in these acts, page 80. The Court also

made a scathing denounciation of the County Officials showing the loss which their action had caused Martin Woldson in failing to perform their duties, paragraph XVL, pages 79 and 80. The Court found that the *use value* of the occupancy of the land would have been sufficient to have paid all the levies thereon after the property was subject to being deeded for past due assessments. It also found that Martin Woldson owned $35,000.00 warrants outstanding against the land, "that the action of the commissioners and officials of Boundary County, Idaho, have been such that it will prevent the plaintiff from collecting any part of said warrants whatever, and that had said land been sold when the deeds thereon became due, or shortly thereafter, the plaintiff could have collected the warrants or a good part thereof," page 80.

These findings were made in an action in the State Court in which the Boundary County Officials and the Drainage District Officials were parties, and in which the case was tried on its merits, and was the third case already tried by the State Court in regard to this particular matter. The decision in the first case ordered a writ of mandate issued to compel the County Officials to execute the deeds soon after they became due, pages 43 to 51. The deeds should have been taken in 1932 and 1933, and this order for the first writ of mandate was dated March 25, 1936. Thereafter, another action was commenced by some of the Drainage District Commissioners and others against Martin Woldson and the County Commissioners. This was

also decided in Woldson's favor. The Decree in the case appears pages 53 to 54 inclusive, and is dated April 29, 1938, in which the Court found in favor of Woldson and against the Plaintiff.

In these first two cases the Court in each of them found that all of the things required by law as a prerequisite to the issuing of Tax Deeds had been done so that nothing remained to do but simply to execute the deeds; Findings No. 13, pages 38, first case. The County Treasurer herself testified that she had all the deeds made out at the time the law required them to be issued about 1932 and nothing remained to do but deliver them, page 145. Had they been executed and delivered when this last judgment was entered the County and purchasers would have been entitled to the land to crop it that year, but instead of complying with these orders the County Officials proceeded to give all the notices again and did not take the deeds until in August, 1938, and then refused to sell the same until Martin Woldson had served notice on them and made a written demand. He also made demand upon them, after the deeds were issued, to take charge of the lands and collect the crops, page 55. They refused to do this. He demanded that they sell the land and thereafter they put it up for sale; he bid it in, but they refused to transfer it solely because he did not bid enough therefor, Ex. 1, page 95.

Under the law in force and effect when the bonds were issued the County Commissioners were required to sell the land to the highest bidder. Martin Wold-

son then commenced action to compel them to accept his bid. This was the third case. It was tried on its merits, the State Court making full and complete Findings of Fact and Conclusions of Law, deciding every question in Martin Woldson's favor, and ordering a writ of mandate. That decision is the subject of this suit, pages 51 to 53, Findings and Conclusions, pages 57 to 83 inclusive.

In this Decree it provided, after describing the land, that the deed should be made to the Plaintiff (Martin Woldson).

> "Upon the Plaintiff making payment to said Defendants or to the Treasurer of Boundary County, Idaho, for said property, the amount of said payments *either in cash or its equivalent*, provided, however, that the amount due to Boundary County, Idaho, for State and County taxes shall be paid in cash," page 52.

It provided then the Commissioners should give Martin Woldson notice when the deeds would be ready for delivery to him, page 53.

We think it proper here to call attention to an important provision in the law of Idaho authorizing the payment of bond and interest assessments by past due bonds and interest coupons. Section 41-2565, Idaho Codes Annotated as amended, Session Laws 1933, page 447, which reads as follows:

> "Section 41-2565. The assessments levied by the Commissioners of the Drainage Districts must be paid in lawful money of the United States; provided that warrants of the District may be accepted as cash for the payment of assessments

levied for warrant redemption, and that matured bonds of the District and accrued interest coupons detached from any of the bonds of the District, when presented may be *accepted as cash* in payment of assessment levied for bond interest and principal, and in the event that the said bonds so used are of a greater denomination than the said assessments, the tax collector shall indorse upon said bond or bonds the amount necessary to pay said assessment or assessments and the date of said payment and take a receipt from such bondholder for the amount so credited, and either such receipt describing the bond so indorsed or such indorsement shall be prima facie evidence that the said sum so indorsed has been paid on said bond or bonds."

Woldson contended that this statute was applicable, that the bonds were a first and prior lien as they were authorized and confirmed in 1922, pages 57 and 58. Refunding bonds were issued and confirmed and lien of original bonds continued in full force for the payment of the refunding bonds. The confirmation decree was never appealed from, page 58. Woldson's contention was that the sale was simply a continuation of the collection and payment of the assessments; that his lien was a first and prior lien established by Court Decree in 1922, and therefore superior to all subsequent liens under the laws of Idaho. Within a few days, after the Decree was entered, Dollie Bruce, Clerk of the Board of County Commissioners, gave Martin Woldson notice, as provided in the Decree, that they would execute the deeds and directed him to make the payments as follows: $22,811.33 cash for

State and County taxes, and delivery of $49,232.63 bonds and coupons.

A copy of this notice was Defendant's Exhibit No. 3 identified by the Deputy Clerk as having been given, page 129. It was part of Respondent's designation of portions of record on appeal to Circuit Court, page 283, paragraph 3 thereof, but we are unable to find it in the record. However, the testimony in regard thereto is definite and certain, page 155. The Deputy Clerk testified that this notice had on it the following, "This is in accordance with judgment in case No. 1083"; that was the case referred to. Daisy Kelly testified that No. 3 was a copy of the Auditor's Certificate, page 199. It showed the amount of cash and bonds and interest amounted to $49,232.63, page 149. It was admitted the County got all the bonds, all the interest, and all the cash they demanded at that time, page 157. Mr. Woldson delivered and paid just exactly what the County demanded, page 170. Later they notified him some more bonds should be submitted, that there was an error (page 171), and he sent those to Dollie Bruce.

In all things Woldson had depended upon the County figuring the exact amount and what was desired and acted in accordance therewith. Only a portion of the evidence was in the record in the Circuit Court. Hon. L. B. Schwellenbach, who is the only Judge who heard all the evidence in this case, and who decided it, made full Findings on this particular

question and in his opinion he finds as follows (page 195):

> "Nevertheless the judgment was accepted by the Commissioners of the County and in a few days they notified Woldson that upon the payment by him of $22,811.33 in cash for the State and County taxes and the delivery by him of bonds, interest coupons and warrants in the amount of $49,232.63, for the District charges, that they would cause to be executed and delivered deeds to the property described in the judgment. On December 30, 1938, *in conformity with the judgment,* the County Commissioners caused deeds to the property to be executed and accepted in payment therefor $22,811.33 in cash and $49,232.63 in bonds, bond interest coupons, and warrants of Drainage District No. 1 of Boundary County, Idaho. *No appeal was taken from the judgment.*"

The judgment in the mandamus case was dated December 24, 1938, and the settlement was made in accordance with the District's demand on the 30th day of December, 1938, or just six days after the judgment was entered.

Woldson had pleaded that the appellant was estopped in this case to maintain this action, and on that question Judge Schwellenbach found as follows (page 195):

> "No appeal was taken from the judgment, possession of the land was given to Woldson, drainage district assessments were levied against the property, and paid by Woldson in the amount of $16,250.90, and taxes were levied against the property and paid by Woldson in the amount of $55,580.09. Thereafter on March 8, 1941, with the

induction into office of two new County Commissioners, this action was commenced, etc."

On page 201 Judge Schwellenbach continued:

"The plaintiff, County, through its commissioners, failed to challenge the language of the judgment of December 24, 1938, either by motion for its correction by the Court which entered it, or by appeal. *The evidence is undisputed that the transaction of December 30, 1938, was at the instigation of Plaintiff's officials.* The Defendant had a right to reply and did rely upon the conduct of Plaintiff when he paid $22,811.33 taxes, and delivered for cancellation the $49,232.63 worth of bonds. He had no reason to believe that a change in control of the County would result in the attempted change in position on the part of the County. The evidence is undisputed that after Woldson received deeds to the property the County collected from him a total of $55,580.09 taxes, and the drainage district collected from him in 1939 $16,250.90 drainage district assessments. He was required to spend $1,000 in order to defeat certain homestead claims in the office of Public Lands in Washington, D. C. Believing that he was the owner of this property, he sold a portion of it, and faces the possibility of a damage action by the purchaser in the event his title was invalid."

None of these facts found by Judge Schwellenbach have been challenged in any manner whatever. In Judge Schwellenbach's Findings, pages 208 to 214 inclusive, he again finds all of these facts and finds that the sale of the land was with full knowledge of appellant, and that the purchaser was never made a party to the action. He finds in Findings VIII, page 213, that the appellant accepted the benefit of the judg-

ment with full knowledge of all the facts and that the Drainage District Commissioners were parties to the action in the State Court and knew of the judgment rendered therein, and with full knowledge of all the facts acquiesced in and accepted the full benefits of the judgment. He finds that the County Commissioners themselves construed the judgment and that Martin Woldson accepted the construction that they placed on it, and that both parties acquiesced therein and that the matters involved in that litigation were completely litigated and settled in the litigation, paragraph IX, page 213. As his Conclusions of Law he finds the Idaho Judgment was conclusive and that the appellants are estopped and having acquiesced in the judgment and accepted the benefits they are bound thereby. He then entered a Decree in favor of the respondent.

The evidence completely substantiated all of these things. Among other things it showed that Dollie Bruce conducted the sale of the land for the Commissioners, page 277, Vol. 2. She is the same party that acted for them, gave the notice to Woldson as to what he should pay, and accepted the bonds, page 276, Vol. 2. The bonds in the Treasurer's Office showed that they were cancelled on her records January 6, 1939, the day they were received, by her and all the Boundary County Officials knew it, page 275, Vol. 2, page 277, Vol. 2. Not only that but the District then refused to make a levy for the balance due on Woldson's bonds, which the State Court in that action had found was

due and owing. The District Commissioners gave notice to the County Treasurer not to pay any more on Woldson's bonds from monies on hand or levied for and claimed the right to cancel and take credit for $28,717.00 bonds and coupons which they claim were delivered on the sale and cancelled. This notice was dated May 22, 1942, or about a year and a half after the action in this Court was started, page 235, Vol. 2. Martin Woldson was required to commence a mandamus action in the Federal Court to cancel the levy for these bonds. The findings in that case appear pages 236 to 246, Vol. 2 and on page 240 Judge Cavanah held that the bonds Martin Woldson had paid in on this land sale should be deducted from the amount to be levied for. He further held in that case that Martin Woldson had been overcharged $2,774.81 which he had paid in cash to the County, and sustained Martin Woldson's contention holding that there was still a balance due him, after crediting all monies in the hands of the County Treasurer, levies outstanding and uncollected, in the amount of $17,707.49 for bonds and $9,373.53 interest coupons, and on page 249 ordered a levy therefor. This was the fourth case. Another action was then brought by the Drainage District against the officials of Boundary County regarding this matter, December 2, 1942, in which Woldson intervened and in which the complaint in intervention was introduced in evidence as Exhibit 10, but was not made a part of this record. That is case No. 5.

After Woldson acquired the land the Commission-

ers refused to clean out the ditches so that Woldson's land would be drained, but assessed it for the maintenance charges just the same. He brought an action to compel the cleaning out of the ditches which is reported in 132 Fed. 2nd, page 622. That was the sixth case and with this one makes seven cases already prosecuted over this matter, it all being based on the neglect and refusal of the Drainage District Commissioners and the County Commissioners and County Officials acting in conjunction with each other in refusing to perform their statutory duties.

Daisy Kelly, the Treasurer, testified that after these bonds had been delivered by Mr. Woldson no levy was ever made for them and they appeared cancelled on her records, pages 277 to 278.

ARGUMENT AND AUTHORITIES

We are endeavoring to limit this reply only to those things which will give the Court a bird's-eye view of the facts, then the law on these facts, to show that there is nothing involved which would warrant this Court in taking jurisdiction herein.

As to the law, we will make no lengthy argument.

Plaintiff is not interested, and therefore has no right to maintain this action. The Drainage District, through its Commissioners, were parties to the action in the State Court, acquiesced in the judgment, accepted its benefits, and neither moved for a new trial nor appealed, and the Plaintiff herein acted likewise, but there is this difference; this Plaintiff has no in-

terest in the case. The sale was solely for drainage district assessments but the bid provided the amount of the State and County taxes should be paid first therefrom. As the Plaintiff got absolutely everything it was entitled to it has no interest. As the other defendants accepted what was adjudged due them and did not appeal but acquiesced in the judgment the Plaintiff has no right to maintain the action as the action must be prosecuted by the real party in interest.

Lawyer v. Post, 109 Fed. 512;

United States v. Fuller, 14 Fed. (2nd) 812;

Higging v. Swygman, 141 N. E. 788;

Lefebure v. Baker, 220 Pac. 111;

Asplund v. Hannett, 249 Pac. 1074;

Hedin v. Westdala Lutheran Church, 59 Ida. 241-81 Pac. (2nd) 741;

Stewart v. Price, 64 L. R. A. 581;

Dixon v. Gries, 39 Pac. 857;

City of Chelsea v. Treasurer, 130 N. E. 397.

Therefore as Boundary County has no interest and neither stands to win or lose it cannot prosecute, as the action must be prosecuted in the name of the real party in interest and that is not the Plaintiff.

Again Respondent sold considerable of the property, after it was deeded to him. The County knew this, collected taxes, and assessments from the purchaser but did not make the purchaser a party to the suit, and as his interest would be affected by any judgment cancelling Woldson's deeds, it is fatal to the Plain-

tiff maintaining the action. *Idaho Irrigation Company v. Dill*, 25, Idaho 711-139 Pac. 714, where the rule is stated as follows:

> "It is elementary that if a person is not made a party to an action, his rights cannot be determined or *affected* by a judgment or Decree entered in such cases."

Judge Schwellenbach, in his opinion, page 202, calls attention to this sale and in Findings VI, 212, he finds:

> "He sold a part of said land to one F. E. Vinion and said Vinion went into possession of the same with the full knowledge of Plaintiff, and that the said Vinion was never made a party to this action."

SALE OF PROPERTY BUT CONTINUATION OF COLLECTION OF ASSESSMENT:

In view of the fact that the Idaho statute specifically provides for matured bonds and interest coupons to be "accepted as cash," in payment of assessments therefore, the bonds were property so applied, as the sale was for the assessments for the bonds and interest coupons and it is but a part of the scheme for collection. This is the law in Idaho.

Washington County v. Paradis, 38 Idaho 364-367-222 Pac. 775:

> "The authorities are to the effect that a County does not acquire a vested right in property by virtue of a tax sale to it for delinquent taxes, and that such a purchase of property by a County

goes no further than to perpetuate the lien of the tax *and is in aid of collection.*"

That is the general rule.

"Its purchase was in perpetuation of the lien and in aid of collection, etc."

Essex Public Road Board v. Shinkle, 140 U. S. 343-35 L. Ed. 447.

The bonds are confirmed by Decree of the Court and constitute a lien on the land and the lien attaches to the money collected when the property is sold.

"The bonds succeed to the lien of the original assessment, and the assessments thereafter levied and collected are a trust fund *pledged by law* for the payment of the bonds, * * *. Assessments collected are public funds, impressed with a trust in favor of the bondholders."

Meyer v. City of Idaho Falls, 52 Idaho 81-87-11 Pac. (2nd) 626.

"All monies collected by the Treasurer, whether on account of installments, penalties, interest or sale of lands, must be by him paid into the Treasury *for the benefit of the bondholders.*"

River Farms Co. v. Gibson, 42 Pac. (2nd) 95-100.

To hold otherwise would be to allow a vested legal right and a valid lien of one party to be taken and destroyed for the benefit of the other. This is not permitted in Idaho.

"Giving the statute such a construction, it authorizes and requires the taking of the property of one citizen to pay the debt of another. Not only this, but it renders possible the complete wiping out and destroying of contracted rights.

Such a statute, if thus construed, would be abhorent to natural justice."

Scottish American M. Co. v. Minidoka Co., 47 Idaho 32-44-272 Pac. 498.

In Idaho special improvement bonds ARE PARAMOUNT TO ALL OTHER LIENS, EXCEPT ALONE GENERAL STATE OR CITY TAXES.

"The lien of the bonds upon the lands of an improvement district *becomes fixed and paramount to any other liens*, excepting those of the general State, County and City taxes."

Bosworth v. Anderson, 47 Idaho 697-711-280 Pac. 277.

It is a General Rule That An Assessment Which is First in Point of Time is Paramount to Later Assessments or Liens.

"At Common Law priority of liens as a rule was fixed by the time the liens attached to the subject matter, but, as to the statutory liens, a different rule as to priority *may* be fixed by the statute creating them."

Brownell Imp. Co. v. Nixon, 92 N. E. 693.

No other rule is fixed by statute in Idaho, and by express statutory provision the common law is the law of the State, except where changed by statute.

Idaho Codes Annotated, 70-116;

Kelly v. Easton, 35 Idaho 340-343-207 Pac. 129;

Drake v. Earhart, 2 Idaho 750-23 Pac. 541.

"It is a well settled rule as to both legal and equitable liens, that in the absence of statutory regulations to the contrary, that the lien which is

prior in time gives a prior claim and is entitled to satisfaction out of the subject matter before other subsequent liens binding the same property."

Parker-Washington Co. v. Corcran, 129 S. W. 1031.

"The rule in the absence of statutory provision to the contrary, is that liens take precedence in the order of time; the first in point of time being superior, * * *. This order of priority will not be disturbed or altered, *unless expressly provided by statute.*"

Des Moines Brick Mfg. Co. v. Smith, 79 N. W. 77.

"The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, * * *."

Rankin & Schotzell v. Scott, 12 Wheaton 117-6 L. Ed. 592.

"Priority of lien certainly gave priority of legal right, just as in the case of a first and second mortgage.

Between equal equities the first in order of time shall prevail."

Howard v. Mil. St. Paul Ry. Co., 101 U. S. 837-25 L. Ed. 1081.

This rule is sustained by the following authorities:

Scott-McClure Land Co. v. City of Portland, 125 Pac. 276;

Bibbins v. Clark, 57 N. W. 884;

Smith v. Skow, 66 N. W. 893;

Bell v. City of New York, 73 N. Y. S. 298;

Bank of Quapaw v. Denney, 225 Pac. 362;

Paik v. Chung, 211 Pac. 727;

Ferris v. Alice Mint Gum Co., 124 Atl. 577;

Sloat v. Midwest Finance Co., 189 N. W. 52.

These were the questions that were before the Idaho Court. The Court determined the issue in favor of Woldson and held and adjudged he could pay either in cash or its equivalent, and by the Idaho Statute, where the assessment is for bonds and interest, the mature bonds themselves and the interest coupons are the equivalent of cash. The land was sold solely for Drainage District assessments, but a part of it was for warrants of which Woldson held those entitled to be first paid. The assessment for the bonds was levied about six years before the assessment for the warrants. The sale was not sufficient to pay the bond assessments alone but left a deficiency of $13,058.27 (Judge Cavanah's Decree in a later case, page 240). Judge Elder in the case compelling the sale found as to each tract that the bid was fair and all the land was reasonably worth, inserting this provision after the finding as to each tract of land:

> "And the Court finds that the Plaintiff's bid for said land was fair and all that said land was originally worth." Page 72.

The only pretense and claimed defense set up by the petitioners in that case was that Martin Woldson did not bid sufficient to cover *all* taxes against the land. Exhibit 1, page 95. The bid was rejected for no other reason.

Woldson held the first warrants, which would be entitled to be first paid as they are paid in order of priority under the statute, and as to these the Court found:

> "That the action of the Commissioners and the Officials of Boundary County, Idaho, has been such that it will prevent the Plaintiff from collecting any part of said warrants whatever." (Page 80).

Most certainly with a deficit of $13,058.28 on the bonds and nothing to pay on the warrants first entitled to be paid, every one knew the payments were to be applied for mature bonds and interest coupons, and following this Decree and within six days, the Petitioner notified Woldson in writing to turn in $49,232.63 bonds, and $22,811.33 cash. Judge Schwellenbach's opinion, page 195, and his Findings V, page 211. There can be no doubt they knew what it meant and so construed it and both parties acted on it and the Court so found. Findings IX, page 213.

It is Respondent's Contention That Not Having Appealed from the Judgment of the State Court, Such Judgment is Res Judicata and Conclusively Binding on Petitioner In This Case.

This is a collateral attack on the judgment of the State Court. Page 199.

> "In this case Plaintiff asks collateral to attack a judgment of the Court of the State of Idaho. No appeal having been taken from the judgment, it was final and binding."

On this appeal this Court is not concerned as to the question of whether the judgment is right or wrong, erroneous or correct. Appellants had their day in Court, the case was decided against them, was not appealed from and is binding and conclusive. This

Court does not act as a Court of Appeals from the State Court's judgment, but the judgment concludes the parties thereto. The Court of Idaho even hold that where the questions might and should have been litigated the judgment is conclusive.

Joyce v. Murphy Land Co., 35 Idaho 549-208 Pac. 241, Court held that every question settled "which might and should have been litigated in the first suit."

> "The doctrine of *Res Judicata* applies to all questions which *might* have been raised as well as to all questions which were raised in the prior workman's compensation proceedings."
>
> *Zapantis v. Central Idaho M. & M. Co.*, 136 Pac. (2nd) 154.

In an early case an Idaho Court stated the reason for this rule in this language:

> "A contrary doctrine, as it seems to me, subjects the public's peace and quiet to the will or neglect of individuals, and prefers the gratification of the litigious disposition on the part of suitors to the preservation of the public tranquility and happiness."
>
> *Elliot v. Porter,* 6 Idaho 684-59 Pac. 360.

The very able opinion by Judge Schwellenbach so clearly and conclusively disposes of this question (pages 199 to 201), it would seem nothing further should be said. He quotes the opinion by Judge Cavanah in the case of *Sunshine Mining Co. v. Treinies, et al.,* 19 Fed. Supp. 587, and it is especially fitting where Judge Cavanah in that opinion quotes from Mr. Justice Robert's opinion in *Baldwin v. Iowa State Tr.*

Men's Association, 283 U. S. 522-525-75 L. Ed. 1244 as follows:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

The statement also from Judge Mathew's decision in the same case as *Treinies v. Sunshine Mining Co.,* when that case reached the Circuit Court, 99 Fed. (2nd) 651-655 where he said:

> "Whether the issues determined by the Idaho (401) Decree were rightly or wrongly determined is no longer open to inquiry having been rendered by a Court which had jurisdiction to render it, and having long since become final, that Decree, *even though erroneous,* is valid and conclusive on the parties thereto and all persons claiming under them."

This followed further by the very distinct statement of this rule of law by Mr. Justice Reed when this case reached this Court (308 U. S. 66, 78) as follows:

> "One trial of an issue is enough. The principles of Res Judicata apply to questions of jurisdiction as well as to other issues, as well to jurisdiction of the subject matter as of the parties."

The following cases also fully support the rule which is one universally and generally followed in all courts:

Ex parte Moran, 144 Fed. 594, C. C. A.;

Fayerweather v. Ritch, 91 Fed. 721, C. C. A.;

So. Pac. R. Co. v. U. S., 168 U. S. 1-42 L. Ed. 355;

U. S. v. Brown, 281 Fed. 657, C. C. A.;

Lineker v. Marshall, 7 Fed. (2nd) 875 9th, C. C. A.;

Roach v. McDonald, 275 U. S. 449-72 L. Ed. 365;

Stoll v. Gottlieb, 305 U. S. 165-83 L. Ed. 104.

These are but a few of the cases on this subject which is one of such general application. We think in light of the statement of facts and authorities in Judge Schwellenbach's opinion there should be no room for doubt as to its being applicable to this case.

PETITIONERS ARE ESTOPPED

Estopped by accepting the benefits under a judgment, or by accepting the decision and acting thereunder, and thereby causing the other party to change his position, are well established rules. Where one is ordered by Writ of Mandate to do an act, accepts the Court's decision and both parties act thereunder, the defendant cannot thereafter even appeal from that decision, much less be heard to attack it in a collateral proceeding as is attempted to be done here. Judge Schwellenbach clearly set out the reason of the rule as applied to this case, page 195. The petitioners themselves notified Woldson how much in bonds to pay and how much in cash and Woldson acted in full compliance with the petitioners' demand, made the payments and the deeds were executed and possession delivered to Woldson, December 30, 1938, or just six days after the judgment was rendered, page 195, Find-

ings V, page 211. The bonds were then delivered and cancelled of record. Woldson sold part of the land to one Vinion. Thereafter petitioners demanded of Woldson, as owner of this land, $16,250.90, additional Drainage District assessments, and $55,580.09 other taxes, and Woldson paid the same, Findings VII, page 213, Judge Schwellenbach's decision, pages 201-202. Homestead entries were filed on the lake bottom reclaimed, which was part of the land Woldson purchased, and he spent $1,000.00 contesting these before the Commissioners of Public Lands in Washington, D. C., page 202. Over one-half of the land had become a solid weed patch, and on 87 acres it could not be cut because thereof, page 254. It was not capable of being cropped, page 255. Woldson devoted time and expense to reclaiming the land from the weeds so it could be farmed, and with large Diesel track layer engines and heavy machinery plowed and cultivated the land 16 to 18 times during the season to eradicate the Canadian thistle, quack grass and noxious weeds with which the land had become covered, pages 256-258. He lost $51,051.60 in his operation in farming due to this, page 273. Not until after these things had been done and two new Commissioners came into office was any objection ever made. We think no case has ever been presented showing stronger equitable grounds for Estoppel than this.

In this regard the rule of Estoppel in Idaho is fully effective against Counties and the State itself.

"It is also well established that a municipal

corporation may, by its conduct or the conduct of its officials and agents, be estopped to assert its claim to title of property."

Robinson v. Lemp, 29 Idaho 661-161 Pac. 1024.

"and substantial considerations underlying the doctrine of equitable estopped applies to the Government as well as to individuals."

State v. Twin Falls Sal. River L. & W. Co., 30 Ida. 41-166 Pac. 220.

The County Commissioners have the authority in Idaho to settle any case.

"Under the powers given to the Board of Commissioners it may settle a case pending against the County, on appeal, and where they do settle such case, and it appears from the record that no beneficial results can accrue to the County from a determination of the appeal, the appeal will be dismissed on motion."

Board of County Commissioners v. Bassett, 14 Idaho 324-93 Pac. 774.

Under this authority the Board of Commissioners, as then constituted, had a right to settle the case. The Commissioners of the Drainage District were parties to this suit, and acquiesced in the settlement, page 195. Where Judge Schwellenbach states:

"Nevertheless the judgment was accepted by the Commissioners of the County *and the Drainage District.*"

Again on page 206 he says:

"The Commissioners of the Drainage District acquiesced in and the Drainage District accepted the benefits of the transaction of December 30, 1938."

And on the same page he says:

> "Furthermore, in 1939, the Drainage District collected $16,250.90 assessments from the defendant."

The sale was for the Drainage District assessments only, as appears from the recitals in the Commissioner's Deed, page 12, but the bid included the State and County taxes which had attached to the land, and this, of course, went to the County. As the District acquiesced in the judgment and never appealed therefrom, and as the County not only got every cent it had coming for taxes, and, as found by Judge Cavanah in the case to compel a levy to pay the balance of Woldson's bonds, page 240, were overpaid a large sum, more than they had coming. What beneficial interest could accrue to the County in this case? Wherein did a new Board have the right to set aside an act of a former Board in which the County no longer had any interest, and start this suit without the Drainage District being a party?

It is fundamental that a judgment in mandamus settles the rights of the parties and is conclusive where not appealed from, and a compliance therewith settles the case for all purposes.

Alarid v. Romero, 25 Pac. 788;

Leet v. Board of Supervisors, 47 Pac. 595;

Campbell v. Hall, 69 Pac. 12;

San Diego School District v. Board of Supervisors, 32 Pac. 517.

But Accepting the Benefits of a Judgment, It Estops the Party from Challenging It on Any Ground.

> "Held, that having accepted the amounts adjudged to them, they were estopped from questioning the validity of the judgment."
> *Hunt v. Wright*, 139 S. W. 1007.

> "Principle of estoppel applies as well to judgments void for want of jurisdiction as to judgments in other cases."
> *Cape Girardeau T. R. Co. v. So. Ill. & Mo. B. Co.*, 114 S. W. 1084.

> "Estoppel. One cannot accept benefits of a decree without admitting its legality."
> *Morgan v. Morgan*, 283 S. W. 979.

The following cases fully sustain Respondent's contention in this regard:

> *James v. City of Seattle*, 106 Pac. 1114;
> *State Bank of Chicago v. Idaho-Oregon L. & P. Co.*, 219 Fed. 594;
> *Officer v. J. L. Owens Co.*, 252, Fed. 337, C. C. A.;
> *Stillman v. Gorman*, 69 Alt. 601;
> *McCune v. Goodwillie*, 102 S. W. 997;
> *Sage v. Finney*, 135 S. W. 996;
> *Horst v. Barrett*, 104 So. 530-533;
> *James v. Park*, 271 S. W. 370-372;
> *State v. Elkin*, 270 Pac. 875;
> *Gillespie v. Wilson*, 221 Pac. 82;
> *Johnson v. Ray*, 222 Pac. 667;
> *Pac. Mill & M. Co. v. Lette*, 94 Fed. 968-974.

and the other authorities cited in Judge Schwellenbach's opinion on Estoppel generally.

SUMMARY

Here the Appellant faces all these legal difficulties. They accepted the judgment, put their own construction on it, gave the Respondent written notice what amount of bonds to present and what cash to pay, and he paid accordingly. They notified him that they had made a mistake and to produce more bonds, which he did, and Judge Cavanah found that they had overcharged him a large sum on the cash collected. He relied entirely on their action and Judge Schwellenbach so found, page 195, Findings No. 5, page 211. Both Petitioner and the Drainage District, which was the real party in interest, and which was a party to the suit complained of, but is not a party to this action, acquiesced in the judgment, accepted the payments demanded by them, and then in addition to that the following year the District collected from Woldson $16,250.90 assessments on the land sold, and the County collected taxes in the sum of $55,580.09, or a total collected from him the following year after the sale of $71,830.99, and certainly having accepted the judgment and secured this large sum of money they should not now in good conscience be allowed to repudiate their own acts, wherein they have secured this benefit. But further than that, the Court found that Woldson relied on this and spent $1,000.00 on account of Homestead contests before the Commissioner of Public Land, page 202. He sold a considerable portion of the land, page 202. The land had been allowed to become foul with noxious weeds, was not worth crop-

ping, and Woldson started a program of 16 to 18 plowings and cultivations of the land a year to eliminate the weeds so the land could be used, and lost $51,051.60 in doing this, page 273. All this was known to the Drainage District and the County, and if there ever was a case calling for the invoking of the doctrine of estoppel, certainly this is it.

We have refrained from citing many of the leading, very pointed cases relied upon by Judge Schwellenbach in his Opinion, in the interest of brevity, and we especially direct the Court's attention to his very logical decision, pages 199 to 206 inclusive, and the authority there cited covering the points raised in this case. We think this opinion, based upon the facts as he found them, and the law as it exists, is conclusive.

The Petitioner presents the questions raised by them as if your Honors were sitting as a Court of Appeals to decide whether the Trial Court in Idaho, from whose judgment no appeal was ever taken, had correctly interpreted the Idaho law. We respectfully submit that question was solely for the Idaho Trial Court, and no one else, when no appeal was taken therefrom. We further respectfully submit that if the Petitioners felt themselves aggrieved by that decision, the Respondent had the absolute right to have that question taken to the Idaho Supreme Court for its decision, and Petitioners cannot evade so doing by any known procedure, and then attempt to re-litigate the question in any other Court. That having complied with that judgment, and all parties having acquiesced

therein, and the Drainage District having done likewise, that these Petitioners, not being the real party in interest, and having secured everything that they claimed they had coming, under no circumstances can maintain another action and are estopped so to do.

We respectfully submit this case presents no new or novel questions of law and nothing has been suggested in Petitioners' Brief which would justify this Court accepting jurisdiction and therefore their application for Certiorari should be dismissed.

Respectfully submitted,

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